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Supreme Court of the United States

October Term, 1955

No. 442

KENDRICK M. COLE,

Petitioner,

against

PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the United States Civil Service Commission, and OVETA CULP HOBBY, Secretary, Department of Health, Education and Welfare,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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Statement

Petitioner believes it necessary to reply to a number of Respondents' contentions set forth in their Brief in Opposition.

(1) It is pertinent to note that the major portion of Respondents' Brief deals with the well-settled rule that this Court will not intervene to review the basis of an Executive Officer's determination discharging an employee, and that judicial inquiry has generally been restricted to the question of compliance with statutory requirements. A different situation obtains here. Respondents have con-

ceded that petitioner is a loyal employee, holding a non-sensitive, non-policy-making position in an Agency which is not primarily concerned with national defense or related matters. Accordingly, the question presented is not whether the assigned reasons for petitioner's discharge should be reviewed by this Court, but whether petitioner, in view of the conceded facts, could be removed, in derogation of his rights under the Veterans Preference and Lloyd-La Follette Acts, under a statute which authorizes removal only where "necessary or advisable in the interests of the national security." That is a judicial question, and one which requires review. (*Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Stark* v. *Wickard*, 321 U. S. 288, 310.)

(2) Respondents' second contention, in essence, is an attempt to dilute petitioner's argument that, in view of the conceded facts, the Secretary could not conceivably have determined that petitioner's discharge was either "necessary or advisable in the interests of the national security" (Res. Br., pp. 12-14). Respondents' argument ignores the plain wording of the Regulations of the Department of Health, Education and Welfare, promulgated September 24, 1953.

Section 2 of those Regulations provides:

> "It shall be the policy of the Department, based on the said Act of August 26, 1950, and the said Executive Order No. 10450 as amended, to employ and to retain in employment only persons whose employment or retention in employment is found to be clearly consistent with the interests of the national security. It shall be the policy of this Department that action on cases involving personnel holding non-sensitive positions in which the relationship of the Government employment to the national security is remote shall normally be taken under routine personnel procedures *if no part of the derogatory infor-*

mation relates to subversion. (Section 3(b)(2) through (8) of these Regulations.)" (Emphasis supplied.)

The phrase "Section 3(b)(2) through (8) of these Regulations" refers to the criteria relating to "subversive" acts and associations contained in Sections 8(a)(2) through (8) of Executive Order 10450, 18 F. R. 2489, as amended, which is set forth in full in Petitioner's App. "A" at pages 32-33 of the Petition.

We think it clear that a concededly loyal employee who associates with Communists; a drunkard; or a person addicted to the use of narcotics, may present a risk to the national security interest where he holds a position in which he has access to classified or secret information, or where he can strongly or otherwise influence policy. But if the loyal employee occupies a non-sensitive, non-policy-making position in an Agency not primarily concerned with the national defense or related matters, is he any more of a risk if he associates with Communists than if he is addicted to the use of narcotics? We think the answer must be "No." However, the policy set forth in the above-quoted Regulation makes it clear that drug addicts and drunkards who occupy non-sensitive jobs are not to be considered "security risks", but that individuals who associate with Communists (although completely loyal themselves) are.

Accordingly there can be no question that in Mr. Cole's case the Secretary totally failed to consider the relationship between petitioner's job and the national security, for if she did consider this relationship, her determination, in the light of the conceded facts, was patently arbitrary. Indeed, a reading of the Secretary's Regulation compels the irrefutable conclusion that if Mr. Cole had been charged with being a habitual user of heroin, he would not have

been deprived of his rights under the Veterans Preference and Lloyd-La Follette Acts.

(3) Respondents' assertion that Executive Order 10450 does not ignore the relative sensitivity of various positions in the Executive Branch (Res. Br., p. 17) totally ignores the key section of that order—Section 7. Section 7 of Executive Order 10450 provides:

> "Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, *shall not be reinstated or restored to duty or reemployed in the same department or agency* and shall not be reemployed in any other department or agency, *unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security* which finding shall be made a part of the records of such department or agency;" (Emphasis supplied.)

Thus, the discretion directly vested by Congress in Agency Heads to suspend, terminate and reinstate suspended employees is conditioned by the Executive Order in the case of reinstatement, on an affirmative finding by the Agency Head that the employee's retention is "clearly consistent with the interests of the national security." In short, Section 7 of Executive Order 10450 imposes on the suspended employee the necessity of an affirmative finding of "clearly consistent with the interests of the national security" as a condition precedent to the exercise of the Agency Head's discretion to reinstate him to duty. It is this condition precedent, as well as the other provisions of

the Executive Order, which creates "a standard more onerous than that provided by the Congress". (See: Pet., pp. 17-20).

(4) Respondents' assertion in answer to petitioner's argument that the notice of dismissal was not "a written statement of the decision of the agency head" is bottomed on their contention that "petitioner does not complain of the insufficiency of the statement of charges . . ." (Res. Br., p. 19). We respectfully call the Court's attention to the letter of petitioner's counsel to the Secretary, dated February 10, 1954, in which counsel stated:

> "I respectfully submit for your consideration the following additional factors:
>
> "(1) the charges contained in the letter of November 25, 1953 were insufficient on their face and not in compliance with Section 14 of the Veterans Preference Act (5 U. S. C. Sec. 863) or the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, et seq.) . . ." (J. A. 30).[1]

(5) Respondents' attempt (Res. Br., pp. 20-21) to negate petitioner's argument that Congress never intended the Act of August 26, 1950 to apply to petitioner, alleging the non action of Congress for two and one-half years since the Executive Order was promulgated, cannot be seriously considered. In the first place, it is well-settled that events occurring or statements made after the enactment of a statute, or congressional inactivity on the subject can never supplant the contemporaneous intent of the Congress which adopted the statute as to the meaning of its terms. (See: *United States* v. *Minn. Harvester*, 330 U. S. 258, 282; *Fourcade* v. *United States*, 330 U. S. 8, 14; *Helgerson* v. *Hallock*, 309 U. S. 106, 119.) Secondly, representatives of the Executive

[1] The letters "J. A." refer to the Joint Appendix as printed for the use of the Court below.

Branch testifying on the operation of the statute as extended by Executive Order 10450, have repeatedly informed Congressional Committees that neither the statute nor the Executive Order is used to discharge as a "security risk", a concededly loyal employee holding a non-sensitive, non-policy-making position in a non-sensitive Agency. (See, e. g., the testimony of William F. Tompkins, Assistant Attorney General, and Philip Young, Chairman, United States Civil Service Commission, *Hearings, Senate Sub-Committee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong., 1st Sess., March 8 and 16, 1955, at pp. 92, 95, 96, 99-100, 125-126, 530).

CONCLUSION

For the foregoing reasons and the reasons heretofore set forth in the petition, a writ of certiorari should be granted.

Dated: November 3, 1955.

Respectfully submitted,

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (R. 45-53) is reported at 125 F. Supp. 284. The opinions of the Court of Appeals, *i.e.*, the majority opinion of Judge Prettyman and the dissenting opinion of Chief Judge Edgerton (R. 55-63) are reported at 226 F. 2d 337.

Jurisdiction

The judgment of the Court of Appeals was entered on July 28, 1955 (R. 64). The petition for a writ of certiorari was filed on October 3, 1955, and was granted on November 21, 1955 (R. 65). On November 21, 1955, this Court granted petitioner's motion to substitute respondent Folsom in

place of respondent Hobby (R. 65). Respondent Folsom succeeded respondent Hobby as Secretary of the Department of Health, Education and Welfare upon the latter's resignation. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

Statutory Provisions and Executive Orders Involved

The statutes involved are the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C., 22-1 to 22-3, hereafter generally referred to as the "Act of August 26, 1950"; Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C., 863, hereafter generally referred to as "The Veterans' Preference Act"; Section 6a of the Lloyd-LaFollette Act, 37 Stat. 555, 5 U. S. C. 652a, hereafter generally referred to as "The Lloyd-LaFollette Act." The Executive Order involved is No. 10450, April 27, 1953, 18 F. R. 2489, as amended by Executive Order No. 10491, October 16, 1953. 18 F. R. 6583, hereafter referred to as "Executive Order 10450." The statutes and the executive order, in relevant parts, are set forth in Appendix "A," *infra*, pp. 52-61.

Questions Presented

1. Could the Act of August 26, 1950, as purportedly extended by Executive Order 10450, validly deprive petitioner of his right to appeal his discharge from Federal employment as a "security risk" to the United States Civil Service Commission under Section 14 of the Veterans' Preference Act where it is conceded that he is a loyal employee holding a non-sensitive, non-policy-making position as a Food and Drug Inspector in the Department of Health, Education and Welfare?

2. Did Section 3 of the Act of August 26, 1950 (5 U. S. C. 22-3) authorize the President to require the dismissal of all

federal employees, irrespective of the sensitivity of their positions, whose employment is not found to be "clearly consistent with the interests of the national security," where Section 1 of the Act (5 U. S. C. 22-1) vests discretion in agency heads to suspend and remove federal employees only when necessary or advisable "in the interest of the national security"?

3. Is Executive Order 10450's standard of employee discharge (discharge mandatory unless retention is "clearly consistent with the interests of the national security") consistent with the standard of employee discharge established by the Act of August 26, 1950 (discharge discretionary whenever "necessary or advisable in the interest of the national security") so as to cut off petitioner's rights under the Veterans' Preference and Lloyd-LaFollette Acts?

4. Was the agency head's letter of January 15, 1954, terminating petitioner's employment as "not clearly consistent with the interests of national security," a "written statement of the decision of the agency head" as required by Section 1 of the Act of August 26, 1950?

Statement of the Case

A. Petitioner

Petitioner, an honorably discharged veteran, was classified as a five-point veteran's preference eligible pursuant to Section 14 of the Veterans' Preference Act of 1944 (R. 3, 37). Prior to his suspension on November 13, 1953, he held a position in the classified civil service as Food and Drug Inspector, Food and Drug Administration, New York District, Department of Health, Education and Welfare. It is conceded by respondents that in this position petitioner had no access to any secrets of the Government of the United States, or "classified" material, and was

not in a position to influence policy against the interests of the United States (R. 40).

On October 20, 1954, he was requested by the Chief of Personnel Security, Department of Health, Education and Welfare, to come to Washington, D. C., in connection with an investigation regarding his retention in employment, pursuant to the provisions of Executive Order 10450 which established the government employee security program. During this investigation, he was asked numerous questions about his attitudes, associations and friends (R. 3, 37).

Following this investigation, on November 13, 1953, petitioner received a notice of suspension "pending investigation under Executive Order 10450" (R. 3, 38). The Undersecretary of the Department of Health, Education and Welfare, by letter dated November 25, 1953, informed petitioner of the alleged reasons for his suspension and furnished him with a written statement of charges (R. 4, 38). The charges were:

> "1. That you established and have continued a close association with individuals reliably reported to be Communists.
>
> "2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.
>
> "3. That you have, by your own admission, donated funds to the Nature Friends of America.
>
> "4. That you have contributed your services in the form of work to the Nature Friends of America.
>
> "5. That you have attended social gatherings of the Nature Friends of America." (Pet.'s Ex. 3, R: 16-18.)

It was conceded by respondents in the court below that petitioner was not charged with being disloyal and that none of the charges implied any disloyalty on his part.[1]

Petitioner replied to this letter of November 25, 1953, on December 23, 1953, refusing to make any explanation of the charges since they concerned "associations which I carry on as part of my private informal social life. I consider any request by the U. S. Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of 'freedom of association' " (Pet.'s Ex. 4, R. 19).

On January 15, 1954, the Secretary informed him that his termination had been ordered effective at the close of business, January 20, 1954, since "based on the study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education and Welfare is not clearly consistent with the interests of national security" (Pet.'s Ex. 6, R. 21).

On January 27, 1954, petitioner, by his counsel, wrote the Secretary requesting a reopening of petitioner's case and a hearing. The request was based on the ground that petitioner wrote his letter of December 23, 1953, declining to answer the charges, while recovering from an operation for an esophageal diverticulum which caused petitioner to suffer an emotional and physical unbalance (Pet.'s Exs. 7-9, R. 22-26).

---

[1] "The charges against [petitioner] do not imply any knowing acts of disloyalty on his part * * * *" "* * * As [petitioner] correctly said, 'In the charges made against me I am not accused of * * * doing or saying anything which would indicate that I am disloyal to the Government of this country.' Accordingly, there is no basis for treating [petitioner] as a loyalty case rather than as a security case." (*Appellees' Brief*, pp. 6, 17.)